Supreme Court, U.S.
FILED

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No. ____

In The

SUPREME COURT OF THE UNITED STATES

THOMAS J. CORCORAN, ET AL.,

Petitioners,

v.

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals' decision interpreting the "of and concerning" requirement for defamation can permissibly stand in view of its complete departure from the accepted and usual course of judicial proceedings in the District of Columbia.

PARTIES TO THE PROCEEDINGS

Petitioners Thomas J. Corcoran, Patrick E. O'Donnell and Larry Kitto (deceased) were defendants and appellees in the proceedings below. Respondent Croixland Properties Limited Partnership was plaintiff and appellant in the proceedings below.

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PETITION FOR WRIT OF CERTIORARI

Thomas J. Corcoran, Patrick E. O'Donnell and Larry Kitto (deceased), by and through counsel, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A1-A9) is reported at 174 F.3d 213. The opinion of the District Court (App. A10-A14) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 13, 1999. (App. A1). A Petition for Rehearing and a Petition for Rehearing en Banc were both denied on July 1, 1999. (App. A15 and A16-A17). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

A requisite element of pleading a defamation claim is that the defamatory statement must be "of and concerning" the plaintiff. This case concerns the sufficiency of a complaint to plead a cause of action for defamation and satisfy the "of and concerning" requirement where the defamatory statement plead does not specifically name the defamed party, but rather, misidentifies the party or refers to it by status (such as "the owner") and, where the complaint does not plead other extrinsic facts from which the listener could reasonably identify the defamed party.

According to the Complaint,[1] Croixland Properties Limited Partnership ("Croixland" or "Respondent") is the owner of a greyhound racing facility located in Hudson, Wisconsin. Complaint ¶ 7 (App. A20). In September 1993, Croixland entered into a series of joint venture agreements with three Indian tribes under which Croixland agreed to sell the Hudson greyhound facility to the tribes. Complaint ¶ 8 (App. A20-A21). The agreements also provided that once the land was sold, the applicant tribes and Croixland would jointly manage and control the planned gaming facility. Complaint ¶ 8 (App. A20-A21). The agreements were contingent upon the United States Department of the Interior ("DOI") approving the Hudson greyhound facility for an off-reservation land transfer for gaming purposes. Complaint ¶ 8 (App. A20-A21).

On October 12, 1993, the three Indian tribes submitted an application to the DOI for the approval of the proposed off-reservation land transfer for gaming purposes for the facility owned by Croixland (the "Application"). Complaint ¶ 10 (App. A21-A22). Following the submission of the Application, a lobbying effort was undertaken to oppose the Application. Thomas J. Corcoran, Patrick O'Donnell and Larry Kitto (hereinafter collectively referred to as "Petitioners" and individually referred to by their last names) were involved in that effort. Complaint ¶ 12 (App. A22). On July 14, 1995, the DOI denied the Application. Complaint ¶ 13 (App. A22-A23).

Significantly, the Complaint alleged that in lobbying against the Application, Corcoran and O'Donnell falsely stated to Senator McCain that **a company named**

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[1] For purposes of the dispositive Fed. R. Civ. P. 12(b)(6) motion, the District Court was required to accept allegations in the Complaint as true and draw inferences in Croixland's favor.

Delaware North was the owner of the Hudson greyhound facility and that Delaware North was connected to organized crime. Complaint ¶ 26 (App. A27-A28) (emphasis added). The Complaint further alleged that Croixland was defamed because Petitioners allegedly distributed a previously published Wall Street Journal article. Complaint ¶ 20 (App. A24-A25). That article never mentioned Croixland or even suggested that it was involved in the activities described therein. (App. A35-A45). Rather, it exclusively discussed Delaware North and its alleged connection with organized crime. Id.

Further, the Complaint did not allege any extrinsic facts from which Senator McCain could have reasonably concluded that the alleged defamatory statement referred to Croixland.

Respondent brought suit in the United States District Court for the District of Columbia alleging causes of action for defamation and conspiracy to defame against Petitioners. Jurisdiction in the District Court was based on diversity of citizenship under 28 U.S.C. § 1332(a)(1). Complaint ¶ 5 (App. A20). This litigation was the third lawsuit initiated by either Croixland or its joint venture partners in the wake of the denial of the Application. Complaint ¶¶ 14, 16. (App. A23).

The District Court granted Petitioners' Motion to Dismiss, holding that the Complaint failed to state a claim for defamation because the alleged false and defamatory statements were not "of and concerning" Croixland, the named plaintiff. (App. A13).

The Court noted that "[i]f the allegedly defamatory statements were specific enough that some listeners familiar with the situation could precisely identify plaintiff,

then these statements could have been considered to concern the plaintiff." (App. A13). However, the Court stated that "[a]s there is no suggestion that any of the listeners of the statement believed that Croixland was the object of defendants' communication, plaintiff's case fails as a matter of law." (App. A13).

A panel of the United States Court of Appeals for the District of Columbia Circuit reversed the District Court's decision, holding that a defamation claim exists even if the listener only understands the status of the allegedly defamed party (such as "the owner") without there being any allegation that sufficient information was brought to the listener's attention so that he could reasonably identify the aggrieved party by name. (App. A6-A8).

The U.S. Court of Appeals for the District of Columbia Circuit denied Petitioners' Petition for Rehearing and Petition for Rehearing en Banc. (App. A15 and A16-A17).

REASONS FOR GRANTING THE WRIT

THE COURT OF APPEALS FAILED TO FOLLOW ESTABLISHED PRECEDENT OF THE DISTRICT OF COLUMBIA COURTS IN INTERPRETING DISTRICT OF COLUMBIA LAW.

A writ of certiorari should be granted in this case because the Court of Appeals' decision does not follow the decisions of District of Columbia courts in interpreting District of Columbia common law.

District of Columbia courts have held that in order for a defamatory statement (which does not specifically

name the defamed party) to be "of and concerning" the given plaintiff, extrinsic facts must be alleged and proved from which the listener could reasonably conclude that the statement referred to the plaintiff by name. See Harmon v. Liss, 116 A.2d 693, 695-696 (Mun. Ct. App. D.C. 1955).

The Court of Appeals' decision has changed this law. It held that a defamation claim exists even if the listener only understands the status of the allegedly defamed party (such as "the owner") without there being any allegation (or later proof) that sufficient information was brought to the listener's attention from which he could reasonably identify the aggrieved party by name. (App. A6-A8). Even if the listener (herein, Senator John McCain) never knew the name or even the existence of the named plaintiff (Croixland), the Court of Appeals has erroneously held that Croixland, nonetheless, can properly sue for defamation by simply pleading that Senator McCain was told only that the owner was connected with organized crime.

This decision obliterates the "of and concerning" requirement and establishes a dangerous precedent whereby an unnamed party can pursue a defamation claim based on a defamatory reference to him by status alone without any further allegations from which the listener could identify that party.

The Court of Appeals' decision is in conflict with the precedent established by the District of Columbia decision in Harmon v. Liss, 116 A.2d at 695-696. Further, the decision is contrary to the application of District of Columbia law by the U.S. District Court for the District of Columbia in Cunningham v. United Nat'l Bank of Wash.,

710 F. Supp. 861, 863 (D.D.C. 1989) and, Caudle v. Thomason, 942 F. Supp. 635, 638 (D.D.C. 1996).[2]

Rule 10(a) of the Rules of the Supreme Court of the United States states that the following indicate reasons the Court considers in granting certiorari:

> A United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power.

The rationale of Rule 10(a) justifies granting certiorari in this case. The Court of Appeals' decision has completely departed from the precedent established by District of Columbia courts in interpreting District of Columbia law. As such, the Court of Appeals' decision nullifies the "of and concerning" standard in the District of Columbia.

This Court has granted certiorari on numerous occasions where courts of appeals have issued decisions in conflict with, or refused to follow, decisions of state courts interpreting state law. See Exxon Co., USA v. Banque de Paris et des Pays-Bas, 488 U.S. 920 (1988); Six Cos. v. Joint Highway Dist. No. 13, 311 U.S. 180, 185 (1940); West v. AT&T, 311 U.S. 223, 231 (1940); Stoner v. New

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[2] It is also contrary to the decisions of other circuits interpreting similar defamation laws. See Fetler v. Houghton Mifflin Co., 364 F.2d 650, 651-652 (2nd Cir. 1966); Taj Mahal Travel, Inc. v. Delta Airlines Inc., 164 F.3d 186, 189-190 (3rd Cir. 1998); Ruzicka v. The Conde Nast Publications, Inc., 999 F.2d 1319, 1322 n.6 (8th Cir. 1993); and Golden N. Airways, Inc. v. Tanana Publ'g Co. Inc., 218 F.2d 612, 622 (9th Cir. 1954).

York Life Ins. Co., 311 U.S. 464, 465 (1940). These cases were based on the following well reasoned rationale articulated in West v. AT&T, 311 U.S. at 236-237.

> The Rules of Decision Act provides that
>
> > [t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply.
>
> 28 U.S.C. § 1652.[3]

As determined by Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938), the rules of decision established by state courts constitute "laws" of the several states under the Rules of Decision Act and its precursor. Therefore, state common law as announced by the highest state court is to be followed in diversity cases. See id.

The purpose of the Rules of Decision Act and its precursor statute is to avoid having two conflicting systems

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[3] West v. AT&T, 311 U.S. 223 (1940) was decided under a precursor to the Rules of Decision Act which used similar language and stated, "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." Federal Judiciary Act of September 24, 1789, c:20, 28 U.S.C. § 725.

of law within a state between state and federal courts in diversity cases. See West v. AT&T, 311 U.S. at 236.[4]

The cases where certiorari has been granted based on a conflict between decisions of courts of appeals and state courts have been equally applicable to conflicts with decisions of the highest state court or decisions of intermediate appellate state courts. West v. AT&T, 311 U.S. at 236-237; Stoner v. New York Life Ins. Co., 311 U.S. 464, 467 (1940); Exxon v. Banque de Paris, 488 U.S. at 920.

As this Court stated in West v. AT&T, 311 U.S. at 236-237,

> A state is not without law save as its highest court has declared it. There are many rules of decision commonly accepted and acted upon by the bar and inferior courts which are nevertheless laws of the state although the highest court of the state has never passed upon them. In those circumstances a federal court is not free to reject the state rule merely because it has not received the sanction of the highest state court, even

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[4] It should be noted that the Rules of Decision Act is not applicable to the District of Columbia and, therefore, the application of District of Columbia common law is not specifically mandated by Erie. See 28 U.S.C. § 1652; Lee v. Flintkote Co., 593 F.2d 1275, 1278 n.14 (D.C. Cir. 1979). However, the U.S. Court of Appeals for the District of Columbia Circuit has held that the Erie doctrine should be analogously applied by federal courts exercising diversity jurisdiction in the District of Columbia. See Anchorage-Hynning & Co. v. Moringiello, 697 F.2d 356, 360 (D.C. Cir. 1983); Lee v. Flintkote Co., 593 F.2d at 1278 n.14.

> though it thinks the rule is unsound in principle or that another is preferable.

Where an intermediate appellate state court rules on a matter of state law, federal courts must follow it unless convinced by other persuasive data that the highest court would decide otherwise. West v. AT&T, 311 U.S. at 237; Stoner v. New York, 311 U.S. at 467.

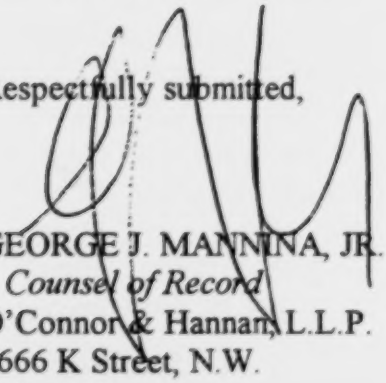
While the Court of Appeals cited Harmon v. Liss, 116 A.2d at 695, as one of the alleged bases for its decision, (App. A6), it completely ignored, disregarded or misinterpreted the law pertaining to the "of and concerning" requirement set forth in that case. In so doing, the Court of Appeals eviscerated the "of and concerning" requirement for defamation claims based on inference in the District of Columbia. Nowhere does the Court of Appeals indicate that this departure was based on persuasive data that it believed would lead the D.C. Court of Appeals to similarly decide the case.

The Court of Appeals' decision is an extreme departure from established precedent in the District of Columbia. The Court of Appeals completely ignored the interpretation of District of Columbia law by a District of Columbia court and altered it to suit its own purposes. This is the type of action which demands this Court to grant a writ of certiorari to exercise its supervisory power.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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by John R. Emshwiller
November 17, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7097

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,
A WISCONSIN LIMITED PARTNERSHIP,
APPELLANT

V.

THOMAS J. CORCORAN, ET AL.,
APPELLEES

Appeal from the United States District Court
for the District of Columbia
(No. 97cv02120)

April 13, 1999

Robert H. Friebert argued the cause for appellant. With him on the briefs were *Robert P. Trout* and *John Thorpe Richards, Jr.*

Robert M. Adler argued the cause for appellees. With him on the brief was *Gary C. Adler*.

Before: WILLIAMS, RANDOLPH and ROGERS, *Circuit Judges*.

Opinion for the Court filed by *Circuit Judge* ROGERS.

ROGERS, *Circuit Judge*: In 1993, Croixland, the owner of a greyhound dog racing facility in Hudson, Wisconsin, entered into an agreement with three Indian tribes to sell the track and thereafter to manage joint casino operations that the tribes would own. A precondition to the agreement was the purchase of the facility land in trust by the Department of Interior under the Indian Regulatory Act, *see* 25 U.S.C. § 465 (1994), and approval of gaming activities on that land under the Indian Gaming Regulatory Act, *see* 25 U.S.C. § 2719(b)(1)(A) (1994). The Minnesota Area Director of the Department recommended approval of the tribes' application in the fall of 1994, but on July 14, 1995, the Deputy Assistant Secretary of Indian Affairs denied the application. After learning in the course of other litigation about actions in Washington, D.C. taken by lobbyists for Indian tribes opposing the sale, Croixland sued the lobbyists for defamation and conspiracy to defame.[1] The district court dismissed the complaint for failure to state a cause of action. We reverse.

I.

This court reviews the dismissal of a complaint under Federal Rules of Civil Procedure 12(b)(6) *de novo*. *See Chandler v. District of Columbia Dep't of Corrections*, 145 F.3d 1355, 1360 (D.C. Cir. 1998). We must accept the allegations of the complaint as true, drawing all inferences in the plaintiff's favor, and will affirm "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *see also Harris v. Ladner*, 127 F.3d 1121, 1123 (D.C. Cir. 1997).

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[1] For ease of reference we refer to appellees as "the lobbyists." Croixland sued Thomas J. Corcoran, Patrick E. O'Donnell, and Larry Kitto as defendants, but in their complaint refer to conduct by defendants and "other persons known and unknown." *See* Comp. ¶ 20.

To succeed on a defamation claim, the plaintiff must show:

> (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that the defendant published the statement without privilege to a third party; (3) that the defendant's fault in publishing the statement amounted to at least negligence; and (4) either that the statement was actionable as a matter of law irrespective of special harm or that its publication caused the plaintiff special harm.

Crowley v. North Am. Telecomm. Ass'n, 691 A.2d 1169, 1172 n.2 (D.C. 1997) (quotations omitted); *see also Restatement (Second) of Torts* § 558 (1976).[2]

Croixland's complaint alleged that the lobbyists had conspired to convince decisionmakers in Washington, D.C. reviewing the tribes' application that Croixland had connections to organized crime. *See* Compl. ¶ 20. Insofar as is relevant to this appeal, the complaint alleged that the lobbyists, "by publishing the defamatory statement that plaintiff [i.e., Croixland] was connected to organized crime, intended to injure plaintiff in its business reputation and to cause the Department of Interior to deny approval of the proposed Hudson casino." *Id.* ¶ 29. To this end, the lobbyists falsely stated, according to the complaint, that "a company named Delaware North was the owner of the

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[2] The lobbyists cite *Caudle v. Thomason*, 942 F. Supp. 635, 638-39 (D.D.C. 1996), for the proposition that heightened pleading requirements apply in defamation cases. In fact, as with any pleading, Croixland's complaint must allege the elements of the cause of action; the Federal Rules of Civil Procedure impose no special pleading requirements for defamation as they do for a specified list of other matters. *See, e.g.*, Fed. R. Civ. P. 9.

Hudson greyhound facility, that Delaware North was connected to organized crime, and that approval of the Hudson casino would allow organized crime to be directly involved in Indian gaming." *Id.* at ¶ 20. To support their false statements that Croixland was connected to organized crime, the lobbyists agreed to distribute an article appearing in the November 17, 1994, edition of the *Wall Street Journal* purporting to describe Delaware North's ties to organized crime.[3] *Id.* One of the lobbyists – Scott Dacey, not one of the defendants – met with and gave the article to the Deputy Assistant Secretary of Indian Affairs. *Id.* ¶ 22. The complaint referred as well to a strategy by the lobbyists to get a story in the *Washington Post* about Delaware North's relationship with tracks in Wisconsin. *Id.* ¶ 21.

The complaint also alleged that a defamatory statement was made to Senator John McCain during a meeting in June 1995, where the lobbyists stated that "the owners of the Hudson greyhound facility are connected to organized crime."[4] *Id.* ¶ 26; *see also id.* ¶ 23. Senator

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[3] The November 17, 1994 *Wall Street Journal* article by John R. Emshwiller, entitled "Sins of the Father? Concession King's Son Fights Mob Stigma As He Builds Empire; Delaware North's Businesses Appear Gangster-Free, But Regulators Wonder; Hosting You at Yosemite," describes Delaware North as having "more than 200 operating units in 39 states and six countries." The article reported that in 1972 the company (then known as Emprise Corporation) was convicted of conspiracy "to hide its ownership interest and the interests of two reputed mob figures in the Frontier Casino in Las Vegas." Since then no such ties had been uncovered, due in part to the current owner's efforts, including hiring "former top federal law enforcement officials" to rid the company of any such ties. The newspaper article noted, however, that state and federal regulators remained skeptical.

[4] At the time of the meeting, Senator McCain was chairman of the Senate Committee on Indian Affairs. *See* Congressional Staff Directory (1995).

McCain allegedly told the lobbyists that he intended to ask the Justice Department to look into the Hudson casino application. *Id.* ¶ 26. After the tribes' application was denied, the lobbyists sent Senator McCain a letter, reminding him of their meeting "regarding the proposed conversion of a dog track in Hudson, Wisconsin, to an Indian gaming casino which would bail out the dog track owner, Delaware North of Buffalo, New York," and thanking him for his "help with the Department of Justice." *Id.* The letter stated that "[w]ithout your assistance, we do not believe the BIA [Bureau of Indian Affairs] headquarters would have overturned its Minneapolis area office on this matter." *Id.* In addition, the complaint alleged that the lobbyists repeated the defamatory statement that the owner of the Hudson facility was connected to organized crime. *Id.* ¶ 38.

In dismissing the complaint, the district court focused on whether the alleged defamatory statements were "of and concerning" Croixland. Croixland had alleged that it was defamed when the lobbyists reported to Department officials and others that the owner of the Hudson track had connections to organized crime, either directly or through Delaware North's ownership. The lobbyists responded that they only made statements about Delaware North, and consequently no reasonable listener would think they were referring to Croixland. The district court agreed with the lobbyists and ruled that because during the meeting with Senator McCain, in the subsequent letter to him, and in the newspaper article, there was no mention of Croixland by name and no indication that any listener understood that the references were to Croixland, the complaint failed to allege defamatory statements "of and concerning" Croixland.

To satisfy the "of and concerning" element, it suffices that the statements at issue lead the listener to

conclude that the speaker is referring to the plaintiff by description, even if the plaintiff is never named or is misnamed. *See, e.g., Peck v. Tribune Co.*, 214 U.S. 185, 188-90 (1909); *Washington Post Co. v. Kelly*, 38 F.2d 151 (D.C. Cir. 1930); *Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955); *see also Service Parking Corp. v. Washington Times Co.*, 92 F.2d 502, 504-05 (D.C. Cir. 1937); *Caudle*, 942 F. Supp. at 638; W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 111, at 783 (5th ed. 1984); *Restatement (Second) of Torts* § 564 (1977). The complaint refers to statements that were not just about Delaware North as Delaware North but rather were about Delaware North in its alleged capacity as the owner [sic] the Hudson facility. Insofar as Croixland was the true owner, even if never named, it could be defamed in its status as the owner.

Grisanzio v. Rockford Newspapers, Inc., 477 N.E.2d 805 (Ill. App. Ct. 1985), on which the lobbyists rely, is not to the contrary. Grisanzio operated a restaurant in a building that was owned by Zammuto, who was reputed to be part of the mob. After a newspaper reported Zammuto's mob connections, Grisanzio sued. The court dismissed his complaint because he was never mentioned by name and a reader of the article would reasonably perceive the distinction between the operator of a restaurant and the owner of the building. *Id.* at 809-10. By contrast, in the instant case, the alleged references to "the owner of the Hudson track" afford no such distinction for the listener.[5] So too, *Carlucci v. Poughkeepsie Newspapers, Inc.*, 442 N.E.2d 442 (N.Y. 1982), is of no assistance to the lobbyists. In that case the court rejected the notion that a

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[5] Furthermore, Illinois employs the rule of innocent construction, *see Grisanzio*, at 809, and the District of Columbia does not, *see Ollman v. Evans*, 750 F.2d 970, 980 n.18 (D.C. Cir. 1984) (in [sic] banc).

reader learning that the 38-year-old owner of a grocery store had been arrested on gambling charges would perceive that statement to be "of and concerning" the corporation that in fact owned [sic] store, especially since a corporation cannot be arrested. By contrast, given the conduct at issue and context of the statements in the instant case, the substitution of the name of one corporation, Delaware North, for another, Croixland, as "the owner of the Hudson facility," presents the possibility that a listener could perceive that the true owner is connected to organized crime.

Consequently, there are two ways that Croixland's complaint sufficiently pled the "of and concerning" element. First, the complaint alleged that the lobbyists linked Croixland to Delaware North and Delaware North to organized crime. Even if the lobbyists misidentified the owner of the facility, it did not remove the taint to the true owner. This is due in part to the fact that Delaware North managed and operated gambling enterprises in a number of states, *see supra* n.3, and assertions of its ownership did not rule out that it had a management agreement or affiliate relationship with Croixland that was consistent with Croixland's ownership of the Hudson facility. In any event, the assertion that "the owner" had mob connections sufficed to place in jeopardy Croixland's opportunity with the tribes inasmuch as mob connections would doom the tribes' application pending in the Interior Department.

Second, the complaint alleged that Croixland was defamed because statements were made about "the owner of the track" having connections to organized crime without reference to Delaware North. It is undisputed, for purposes of the motion to dismiss, that Croixland is the owner of the Hudson track. Compl. ¶ 7. Viewing the inferences most favorably to Croixland, a reference to "the

owner of the track" could reasonably be understood to mean Croixland even if the listener did not know Croixland by name. *See Harmon v. Liss*, 116 A.2d 693, 695 (D.C. 1955). The defamation would arise from the inference that the owner of the track is connected to organized crime where there is not ambiguity that a particular entity owns the track. Drawing favorable inferences for the non-moving party, *see Chandler*, 145 F.3d at 1360, and viewing the alleged remarks from the perspective of the listeners, *see Kelly*, 38 F.2d at 151, *Caudle*, 942 F. Supp. at 638, it follows that, in the context of discussions about a pending tribal application at the Interior Department for the sale of Croixland's track, the lobbyists' defamatory statements could lead listeners such as Department officials or the Chairman of the Senate Committee on Indian Affairs to believe that Croixland was connected in some manner to Delaware North or at least that whoever owned the Hudson track was connected to organized crime.

Furthermore, even assuming that references to Delaware North as the owner of the Hudson track were not "of or concerning" Croixland, the complaint still was not properly dismissed. Under Federal Rule of Civil Procedure 8(e), a complaint may contain alternative theories, and if one of the theories can survive a Rule 12(b)(6) motion, the district court cannot dismiss the complaint.[6] Croixland's complaint included an alternative theory, namely that defamatory statements were made directly about Croixland without reference to Delaware North. This appears in paragraph 26 of the complaint, referencing the meeting with Senator McCain, paragraph 29, regarding the

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[6] "A party may set forth two or more statements of a claim ... [and] [w]hen two or more statements are made in the alternative and one of them if made independently would be sufficient, the pleading is not made insufficient by the insufficiency of one or more of the alternative statements." Fed. R. Civ. P. 8(e).

lobbyists' intent to injure Croixland's business reputation and cause the Department to deny approval of the proposed Hudson casino, and paragraph 38, concerning conspiracy, in which Croixland alleges numerous publications of the defamatory statement by the lobbyists that the owner of the Hudson facility had connections to organized crime.

Accordingly, we reverse the order dismissing the complaint and remand the case for further proceedings.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 97-2120 (HHG)

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS J. CORCORAN, ET AL.,

Defendant.

May 15, 1998

MEMORANDUM

This case, alleging defamation, is before the Court on defendants' motion to dismiss. Upon consideration of that motion, plaintiff's opposition, and defendants' reply, the Court concludes that the motion should be granted.

I

This is one of several cases to arise out of the Department of Interior's 1995 denial of an application of three Indian tribes ("applicant tribes") to establish an off-reservation casino in Hudson, Wisconsin. The applicant tribes had entered into agreements to purchase the Hudson land (upon which was already located a greyhound dog

racing facility) from plaintiff, the owner of the land in question. The agreements provided that once the land was sold, the applicant tribes and an affiliate of the plaintiff would jointly manage and control the planned greyhound racing facility/casino. All agreements were contingent upon the Secretary of Interior approving the establishment of the off-reservation casino and acquiring the land in trust for the benefit of the applicant tribes.

Several other Indian tribes ("opposition tribes") were opposed to these proposed plans. The opposition tribes hired defendants to lobby the government to reject the applicant tribes' application. As one small part of this extensive lobbying campaign, defendants met with at least one member of the United States Congress. Unbeknownst to plaintiff, during that meeting, defendants falsely stated that a company named Delaware North was the owner of the Hudson greyhound facility, that the owner of the greyhound facility was connected to organized crime, and that approval of the Hudson casino would allow organized crime to be directly involved in Indian gaming. To support this claim, defendants distributed copies of a November 17, 1994 Wall Street Journal article that discusses Delaware North's connections with organized crime. Nowhere in the article is Croixland mentioned. Defendants actively worked to spread the false story that Delaware North was the owner of the Hudson greyhound facility and that Delaware North has possible mafia connections.

A month after this meeting, the Interior Department denied the applicant tribes' application. This lawsuit for defamation, as well as two others, followed. Here plaintiff claims that defendants defamed it by alleging that it had connections to organized crime. Defendants moved to dismiss based on several grounds. Because the Court finds

that plaintiff's Complaint fails [sic] state a claim for defamation, defendants' motion to dismiss shall be granted.

II

The standard of review for a motion to dismiss is well-established. In considering a motion to dismiss, a District Court must accept the non-moving party's allegations as true and may dismiss a complaint "only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." Hishon v. King & Spalding, 467 U.S. 69, 73 (1984). Additionally, to plead a case of defamation, "a plaintiff should allege specific defamatory comments, by pleading the time, place, content, speaker, and listener of the alleged defamatory matter." Caudle v. Thomason, 942 F. Sup. 635, 638 (citations omitted).

Turning to plaintiff's Complaint, it appears that plaintiff alleges one specific instance of defamation. That instance involved a meeting between defendants Corcoran and O'Donnell and U.S. Senator John McCain during which the defendants allegedly told the Senator that "the owners of the greyhound facility are connected to organized crime." (Compl. ¶ 26.) The defendants' follow-up letter to that meeting thanked Senator McCain for his assistance in getting the denial and referenced "the dog track owner, Delaware North of Buffalo, New York." Id.

Defendants argue that the claim of defamation included in Paragraph 26 of the Complaint must be dismissed because plaintiff has failed to show that the comments "concerned" the plaintiff. To prove a case for defamation, a plaintiff must show, inter alia, "[t]hat the defendant made a false and defamatory statement

concerning the plaintiff." Prins v. Int'l Tel. And Tel. Corp., 757 F. Supp. 87, 90 (D.D.C. 1991) (citation omitted). Rather, defendants argue, all statements alleging mob connections focused on Delaware North, not plaintiff.

Even statements that do not explicitly refer to Croixland may be found to concern Croixland if "a listener would reasonably believe that the statements referred to [it]." Caudle, 942 F. Supp. at 638 (citation omitted). If the allegedly defamatory statements were specific enough that some listeners familiar with the situation could precisely identify plaintiff, then those statements can be considered to concern the plaintiff. Id. at 638 (quoting Cunningham v. United Nat'l Bank of Washington, 710 F. Supp. 861, 863 (D.D.C. 1989)). In determining whether this is the case, a Court should consider the publication "as a whole, in the sense in which it would be understood by the readers to whom it was addressed." Howard University v. Best, 484 A.2d 958, 989 (D.C. 1984).

Looking at the alleged defamatory statement described in Paragraph 26 as a whole, there is simply no indication that any of the listeners of the statement, Senator McCain (and his aides, if any were present), understood defendants to be referring to Croixland. See Mosrie v. Trussell, 467 A.2d 475, 478 (D.C. 1983) (plaintiff who failed to show that a listener understood an allegedly defamatory remark as a reference to him failed to establish a cause of action). Indeed, in their follow-up letter to the June, 1995 meeting, defendants specifically identify Delaware North as the owner of the dog track and as the entity that was discussed. As there is no suggestion that any of the listeners of the statement believed that Croixland was the object of defendants' communication, plaintiff's case fails as a matter of law. See W. Page Keeton et al., Prosser and Keeton on the Law of Torts § 111, at 783 (5th

ed. 1984) (plaintiff has burden of pleading "colloquium," i.e. that extrinsic facts give the words the defamatory meaning he assigns to them; if he fails to do so he has not made out a case of defamation).

Because the Court finds that this issue is dispositive, it will not address the statute of limitations question raised by the defendants.

III

For the reasons stated above, it is this "15th" day of "May", 1998

ORDERED that defendants' motion to dismiss be and it is hereby GRANTED.

"s/ _____ "
Harold H. Greene
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 98-7097

CROIXLAND PROPERTIES LIMITED PARTNERSHIP, a Wisconsin limited partnership,

Appellant

v.

THOMAS J. CORCORAN, et al.,

Appellees.

July 1, 1999

Before: Williams, Randolph and Rogers, Circuit Judges

ORDER

Upon consideration of appellees' petition for rehearing filed May 13, 1999, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: "s/ "
Robert A. Bonner
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 98-7097

CROIXLAND PROPERTIES LIMITED PARTNERSHIP, a Wisconsin limited partnership,

Appellant

v.

THOMAS J. CORCORAN, ET AL.,

Appellees.

July 1, 1999

Before: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges

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ORDER

Upon consideration of appellees' petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: "s/ "
Robert A. Bonner
Deputy Clerk

Circuit Judge Garland did not participate in this matter.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CIVIL ACTION NO. 97-2120 (HHG)

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,

Plaintiff,

v.

THOMAS J. CORCORAN, ET AL.,

Defendant.

May 15, 1998

COMPLAINT

Plaintiff Croixland Properties Limited Partnership by its attorneys, Friebert, Finerty & St. John, S.C., and Trout & Richards, P.L.L.C., alleges as follows:

PARTIES

1. Plaintiff Croixland Properties Limited Partnership is a Wisconsin limited partnership with its principal place of business located at 2200 Carmichael Road, Hudson, Wisconsin. The names and citizenships of all of the partners in plaintiff is attached as Exhibit A and incorporated herein.

2. Upon information and belief, defendant Thomas J. Corcoran is an adult citizen of the State of Virginia residing at 3064 Shagwood Court, Woodbridge, VA 22192 and, upon information and belief, is a partner in and maintains an office at the law firm of O'Connor & Hannan, L.L.P., 1901 Pennsylvania Avenue, N.W., Suite 1000, Washington, D.C. 20006-3408, and transacts business in Washington, D.C. as a lobbyist.

3. Upon information and belief, defendant Patrick E. O'Donnell is an adult citizen of the State of Maryland residing at 4026 Glen Ridge Street, Kensington, MD 20895 and, upon information and belief, is a partner in and maintains an office at O'Connor & Hannan, L.L.P., 1901 Pennsylvania Avenue, N.W., Suite 1000, Washington, D.C. 20006-3408, and transacts business in Washington, D.C. as a lawyer and a lobbyist.

4. Defendant Larry Kitto is an adult citizen of the State of Minnesota residing at 1227 Main Street, St. Paul, Minnesota 55102 and, upon information and belief, was associated with O'Connor & Hannan, L.L.P. at all times material to this case. Kitto transacts business in Washington, D.C. as a lobbyist.

JURISDICTION

5. The court has jurisdiction pursuant to 28 U.S.C. § 1332(a)(1). There is complete diversity of citizenship and the matter in controversy exceeds the sum of $75,000.00, exclusive of interest and costs.

VENUE

6. A substantial part of the events giving rise to plaintiffs' defamation claims against defendants as alleged herein occurred in Washington, D.C. Venue in this court is proper pursuant to 28 U.S.C. 1391(a).

FACTUAL ALLEGATIONS

7. Plaintiff is the owner of a greyhound racing facility known as St. Croix Meadows duly licensed by the Wisconsin Gaming Commission and located in the City of Hudson, Wisconsin. This facility was constructed at a cost of approximately $40 million. At no time has a company named Delaware North or any of its officers had any ownership or other interest in the facility. Confirmation that Delaware North has no ownership interest in plaintiff could have been obtained by defendants at any time from the Wisconsin Gaming Commission.

8. On or about September 30, 1993, plaintiff and three poor federally-recognized Indian tribes with reservations in rural northern Wisconsin, the Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa), Lac Courte Oreilles Band of Lake Superior Chippewa Indians and the Red Cliff Band of Lake Superior Chippewa Indians, entered into agreements providing for the sale of the Hudson greyhound facility property to the tribes and the joint management and control of the combined greyhound racing facility/casino by an equal

partnership known as the Four Feathers Casino Joint Venture comprised of an affiliate of plaintiff, Galaxy Gaming and Racing Limited Partnership, and the three tribes. The agreements were made contingent upon the Secretary of the Interior approving the establishment of an off-reservation casino at the property under § 2719(b)(1)(A) of the Indian Gaming Regulatory Act ("IGRA"), and acquiring the land in trust for the benefit of the tribes under § 465 of the Indian Regulatory Act ("IRA").

9. Under the rules and policies of the Department of Interior, an application for approval of an off-reservation trust acquisition for gaming purposes is submitted to the Director of the local Area Office of the Bureau of Indian Affairs. Upon completion of a consultation and fact-gathering process, the Area Director submits proposed findings of fact and a recommendation on the application to the Assistant Secretary – Indian Affairs who has been delegated authority by the Secretary of Interior to make the final decision in such a matter.

10. On October 12, 1993, the three Indian tribes submitted an application to the Minnesota Area Office of the Bureau of Indian Affairs for approval of the proposed casino at the Hudson, Wisconsin property owned by plaintiff. Pursuant to Department of Interior policy and § 2719(b)(1)(A) of IGRA, the Minnesota Area Director requested comments on the proposed Hudson casino from Indiana tribes in Minnesota and in Wisconsin, as well as state and local officials. The Minnesota tribes submitted comments in opposition. The Minnesota tribes operating lucrative Indian casinos in and around the Minneapolis-St. Paul area were strongly opposed because the proposed Hudson casino might have a competitive impact on their casinos. The St. Croix Chippewa Indians of Wisconsin,

who operate an off-reservation casino about 50 miles from the proposed Hudson casino in Turtle Lake, Wisconsin, the Oneida Indians of Wisconsin and the Ho-Chunk Community also submitted comments strongly opposing the tribes' application.

11. On November 24, 1994, the Minnesota Area Director submitted her proposed findings of fact and recommendation to the Assistant Secretary – Indian Affairs. The Minnesota Area Director recommended that the Assistant Secretary approve the tribes' proposed Hudson casino.

12. The defendants and others were retained by opposing Minnesota and Wisconsin tribes to attempt to cause Department of Interior officials in Washington, D.C. to reject the Minnesota Area Director's proposed findings of fact and recommendation and to deny the tribes' application for approval of the proposed Hudson casino. Defendants Corcoran and O'Donnell were retained by and represented the interests of the St. Croix Chippewa Indians of Wisconsin. Defendant Kitto was retained by and represented the interests of the St. Croix Chippewas, the Leech Lake Band of Chippewa Indians, the Mille Lacs Band of Chippewa Indians, the Prairie Island Indian Community of Minnesota, and the Upper Sioux Community of Minnesota.

13. Between about December 28, 1994 and July 14, 1995, the opponents of the proposed Hudson casino engaged in a massive effort to have political influence exerted on Department of Interior officials to cause the application for approval of the proposed Hudson casino to be denied. Plaintiff and the three Indian tribes were unaware of most of defendants' activities and their affect on Department of Interior officials and believed, up until

July 14, 1995, that the Assistant Secretary – Indian Affairs Ada Deer would adopt the Minnesota Area Director's proposed findings of fact and recommendation. In a letter dated July 14, 1995, however, Deputy Assistant Secretary – Indian Affairs Michael Anderson, and not Assistant Secretary Ada Deer, issued a letter denying the application.

14. On September 15, 1995, the three applicant tribes filed a lawsuit in the United States District Court for the Western District of Wisconsin challenging the denial on various grounds. The named defendants are Secretary of Interior Bruce Babbitt, Deputy Assistant Secretary – Indian Affairs Michael Anderson, now former Department of Interior Counselor John Duffy and Indian Gaming Management Staff Director George Skibine.

15. In an opinion and order dated March 19, 1997, the United States District Court for the Western District of Wisconsin concluded that there was a "distinct possibility" that improper political pressure affected the decision on the tribes' application and authorized discovery for the first time. *See Sokaogon Chippewa Community v. Babbitt, et al.*, 961 F. Supp. 1276, 1278 (W.D. Wis. 1997).

16. The Four Feathers Casino Joint Venture also commenced a lawsuit against the City of Hudson on a related matter, *Four Feathers Casino Joint Venture, et al. v. City of Hudson*, St. Croix County, Wisconsin, Circuit Court Case No. 95-CV- 540 (the "state court case").

17. Discovery in the state court case beginning on or about February 3, 1997, uncovered a conspiracy involving the defendants to defame plaintiff, overt acts in furtherance of the conspiracy, and the defendants' successful concealment of their conduct.

18. Discovery in the state court case has also uncovered the lobbying campaign by the opponents of the proposed Hudson casino. At the request of the opponents and their lobbyists, United States Senator Paul Wellstone and Minnesota Congressmen Oberstar, Sabo, Vento, Ramstead [sic], Minge, Peterson and Luther wrote letters on behalf of the opposing tribes to Secretary Babbitt and White House Deputy Chief of Staff for Political Affairs Harold Ickes, helped set up meetings with Department of Interior officials and directly lobbied White House and Department of Interior officials. The opposition also met with and obtained the assistance of Donald Fowler, the former Chairman of Democratic National Committee, and, upon information and belief, met with and obtained the assistance of Terry McAuliffe, the National Finance Director of the Clinton/Gore '96 Committee. Technical assistance was also provided to local activists in Hudson. Wisconsin state legislators were lobbied and a letter of opposition was circulated and signed by 29 Wisconsin legislators. The Wisconsin Attorney General was lobbied and a letter of opposition obtained from him. United States Senator Feingold and Congressmen Gunderson, Obey, Barrett and others were successfully lobbied and letters of opposition secured.

19. Despite this huge undertaking, however, upon information and belief, the opponents of the project believed as of April, 1995, that Department of Interior officials were not being influenced by the lobbying effort and were going to approve the tribes' proposed Hudson casino.

20. Upon information and belief, beginning on or about this time and at various other times thereafter, defendants and other persons known and unknown combined, conspired, planned and joined together to

attempt to cause the disapproval of the proposed Hudson casino by falsely stating that a company named Delaware North was the owner of the Hudson greyhound facility, that Delaware North was connected to organized crime, and that approval of the Hudson casino would allow organized crime to be directly involved in Indian gaming. As part of this strategy, defendants and other persons known and unknown agreed to distribute copies of an article from the November 17, 1994 edition of the *Wall Street Journal*, a copy of which is attached as Exhibit B and incorporated herein, which defendants and other persons known and unknown use to support their false statements that the plaintiff is connected to organized crime.

21. In a memorandum dated June 5, 1995, defendant Kitto outlined a strategy for defeating the tribes' application for the Hudson casino. Point 12 stated:

> Get a story in the Washington Post about Delaware North and their relationship with the tracks in Wisconsin. TOM CORCORAN, LARRY KITTO, SCOTT DACY, AND JERRY SIKORSKI WILL PURSUE THIS.

This memorandum was obtained in 1997 in the state court case.

22. On February 24, 1997 at his deposition in the state court case, Scott Dacey, a lobbyist for the Oneida Indians of Wisconsin, testified that on May 23, 1995 and in furtherance of the conspiracy described in paragraph 19, Mr. Dacey met with Deputy Assistant Secretary Indian Affairs - Michael Anderson, and provided Mr. Anderson with a copy of the *Wall Street Journal*. Mr. Dacey testified

further that Mr. Anderson's reaction to being provided with a copy of the article indicated to Mr. Dacey that Mr. Anderson was already aware of the article.

23. In a memorandum outlining discussions with Senator McCain dated June 2, 1995, upon information and belief written either by defendant Corcoran or by defendant O'Donnell, the following is stated:

> We want to see him because of character of Delaware North--possible mafia connection--Wall St. Journal article [sic] that's relevant--
>
> First time of any such real evidence of connections of such an element in Indian gaming.

This memorandum was obtained in 1997 in the state court case.

24. Upon information and belief, all of the named defendants and other persons known and unknown agreed or understood that the purpose of their meetings, discussions and agreements was to utilize the strategy described in paragraphs 19-22 to cause the denial of the three tribes' application for approval of the Hudson casino, understood or should have understood that their method of achieving this purpose by defaming plaintiff was tortious and unlawful and would result in injury to plaintiff, and agreed and understood that each would act in concert with others to achieve this purpose by defaming the plaintiff.

FIRST CLAIM FOR RELIEF AGAINST DEFENDANTS CORCORAN AND O'DONNFLL [Defamation]

25. Plaintiffs reallege all of the other allegations of the Complaint as though fully set forth herein.

26. Pursuant to discovery obtained in the state court case on or after February 3, 1997, the plaintiff learned for the first time that in June, 1995, defendants Corcoran and O'Donnell met with United States Senator John McCain and told him that the owners of the Hudson greyhound facility are connected to organized crime and requested Senator McCain's assistance in causing the denial of the proposed Hudson casino. According to a May 15, 1997 article from the *Minneapolis Star Tribune*, Senator McCain told Corcoran and O'Donnell that Senator McCain would ask the Justice Department to look into the casino application. On July 20, 1995, six days after the tribes' application had been denied, defendants Corcoran and O'Donnell wrote Senator McCain a letter stating as follows:

> Dear John:
>
> As you will recall, last month we met with you regarding the proposed conversion of a dog track in Hudson, Wisconsin, to an Indian gaming casino which would bail out the dog track owner, Delaware North of Buffalo, New York. Enclosed is the announcement by BIA about their decision to deny this application.
>
> Many, many thanks to you for your help with the Department of Justice. Without

your assistance, we do not believe the BIA headquarters would have overturned its Minneapolis area office on this matter.

27. Upon information and belief, defendants Corcoran and O'Donnell deliberately and consciously concealed from plaintiff their defamation of plaintiff.

28. Plaintiff did not know and through the exercise of reasonable diligence could not have known of their defamation of plaintiff until the information was first discovered in the state court case beginning on or about February 3, 1997.

29. Defendants Corcoran and O'Donnell, by publishing the defamatory statement that plaintiff was connected to organized crime, intended to injure plaintiff in its business reputation and to cause the Department of Interior to deny approval of the proposed Hudson casino.

30. Defendants Corcoran and O'Donnell published the defamatory statement with actual knowledge that it was false, or with reckless disregard as to its truth or falsity.

31. The statement that the plaintiff is connected to organized crime published by defendants Corcoran and O'Donnell was defamatory *per se*.

32. As a direct and proximate cause of defendant Corcoran and O'Donnell's publication of the defamatory statement about plaintiff, plaintiff suffered damages substantially in excess of $75,000.

33. Defendant Corcoran and O'Donnell's publication of the defamatory statement was, upon

information and belief, in conjunction with improper political pressure, a cause of the Department of Interior's decision to deny approval of the tribes' proposed Hudson casino which further damaged plaintiff.

34. Defendant [sic] Corcoran and O'Donnell's defamation of plaintiff was done willfully, wantonly and in reckless disregard of plaintiff's interest in its business good will and reputation.

SECOND CLAIM FOR RELIEF AGAINST ALL DEFENDANTS
[Conspiracy to Defame the Plaintiff and to Conceal Their Defamation from Plaintiff]

35. Plaintiff realleges all of the other allegations of the Complaint as though fully set forth herein.

36. Upon information and belief, the defendants combined and conspired with each other and with other persons known and unknown to defame the plaintiff.

37. Upon information and belief, the defendants combined and conspired with each other and with other persons known and unknown to conceal their defamation from the plaintiff.

38. In furtherance of these combinations and conspiracies, the defendants and others committed the following overt acts:

a. On May 23, 1995, Scott Dacey, while lobbying against the application of the three tribes for the Hudson casino, gave a copy of a *Wall Street Journal* article to Deputy

Assistant Secretary Indian Affairs -- Michael Anderson -- in an attempt to link the plaintiff to organized crime. (See ¶ 21, *supra*.)

b. Upon information and belief, on or about June 5, 1995, the defendant Kitto encouraged defendant Corcoran, Mr. Dacey, Mr. Sikorski and all other lobbyists associated with the opponents of the Hudson casino, to defame the plaintiff by saying that plaintiff was tied to organized crime.

c. Upon information and belief, Mr. Anderson, the person who signed the letter denying the application, joined this conspiracy by concealing the defamation from the plaintiff by:

i) Failing to include the *Wall Street Journal* article given to him by Mr. Dacey in the administrative records filed in the United States District Court for the Western District of Wisconsin in the case entitled *Sokaogon Chippewa Community (Mole Lake Band of Superior Chippewa, et al. v. Bruce C. Babbitt, et al.*, Case No. 95C 0659 C.

ii) Providing an affidavit in the case described in ¶ 37(c)(i)

above dated January 25, 1996, which discussed the meeting with Mr. Dacey but omitted any reference to Delaware North, organized crime, or the *Wall Street Journal* article.

d. Upon information and belief, defendants Corcoran and O'Donnell in June 1995 defamed the plaintiff to Senator John McCain as alleged at paragraph 25 of the Complaint.

e. Upon information and belief, the defendants and other conspirators or other persons acting in concert with the conspirators at times and places as yet unknown to the plaintiff, did defame the plaintiff by asserting that the plaintiff was connected to organized crime.

f. Upon information and belief, the conspirators and other persons acting on their behalf and in concert with them intentionally concealed from the plaintiff the defamatory statements linking the plaintiff to organized crime and were successful in concealing their conduct until 1997.

39. As a direct and proximate cause of this conspiracy to conceal defendants' defamation of plaintiff, the plaintiff did not know and with reasonable diligence

could not have known that plaintiff had been defamed by being associated with organized crime until on or about February 3, 1997.

40. Upon information and belief, all members of the combination and conspiracy acted to publish the defamatory statement about plaintiff with actual knowledge that the statement was false, or with reckless disregard as to its truth or falsity.

41. The statement that the plaintiff is connected to organized crime was defamatory, *per se*.

42. As a direct and proximate cause of this combination and conspiracy, plaintiff suffered damages substantially in excess of $75,000.00.

43. Upon information and belief, this combination and conspiracy in conjunction with improper political pressure, was a cause of the Department of Interior's decision to deny approval of the tribes' proposed Hudson casino which further damaged plaintiff.

44. Defendants' combination and conspiracy to defame plaintiff was done willfully, wantonly and in reckless disregard of plaintiff's interest in its good will and reputation.

WHEREFORE, plaintiff requests judgment as follows:

1. On its First Claim for Relief, awarding plaintiff compensatory damages against defendants Corcoran and O'Donnell in an amount to be established at trial;

2. On its First Claim for Relief, awarding plaintiff punitive damages to punish defendants Corcoran and O'Donnell for their willful, wanton and malicious defamation of plaintiff;

3. On its Second Claim for Relief against All [sic] Defendants, compensatory damages in an amount to be established at trial;

4. On its Second Claim for Relief against All [sic] Defendants, punitive damages to punish defendants for their willful, wanton and malicious defamation of plaintiff; and

5. Awarding plaintiff its costs, together with such other relief as the court deems just and equitable.

Respectfully submitted this _____ day of September, 1997.

"s/ "

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FRIEBERT, FINERTY &
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"s/ "

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Counsel for Plaintiff

THE WALL STREET JOURNAL

Sins of the Father?

Concession King's Son
Fights Mob Stigma
As He Builds Empire

Delaware North's Businesses
Appear Gangster-Free,
But Regulators Wonder

Hosting You at Yosemite

By John R. Emshwiller
Staff Report of the Wall Street Journal
11/17/94

WALL STREET JOURNAL (J), PAGE A1

BUFFALO, N.Y. – Settling into his private jet for the flight to his Palm Beach winter estate, Jeremy Jacobs tells a reporter along for the ride that there will be a small delay. "A surprise guest," he says with a grin.

A few minutes later, a station wagon rolls up and a magnificent German shepherd is brought aboard. She is one of the family watchdogs, trained in the former East Germany. Mr. Jacobs explains that when he is away she tends to bite the other dogs.

The pooch sits comfortably next to her master. "What other questions do you have?" asks Mr. Jacobs.

In his own way, Mr. Jacobs also does guard duty. He is the fierce protector of a remarkable 75-year family-business legacy, one that at times has resembled a Horatio Alger story but has contained darker themes as well.

The 54-year-old Mr. Jacobs owns and runs Delaware North Cos. Here. If you stay in a hotel at Yosemite National Park, watch an event at Boston Garden, place a bet at Arkansas's [sic] only dog-racing track, gulp a

hot dog and beer at Detroit's Tiger Stadium or peruse an in-flight magazine on a Delta jet, you have encountered one of the dozens of faces of Delaware North. The company has more than 200 operating units in 39 states and six countries. Annual revenue tops $1 billion. More than 15,000 people work for the concern. All, unequivocally, answer to one man.

He, in turn, answers to the memory of another: his father, Louis Jacobs built the company literally from peanuts, which he and two brothers sold as boys. He lived for his firm and died for it, succumbing to a heart attack one night at his desk in 1968 while putting in yet another 16-hour day.

The 68-year-old patriarch left his then-28-year-old son with a rich but embattled empire. At the time of Lou Jacobs' death, investigators were probing the intensely private company for evidence of organized-crime ties.

Mr. Jacobs vociferously proclaimed his firm's and his father's innocence. But in 1972, the company, known then as Emprise Corp., was convicted of a felony stemming from mob-related business deals. That same year, Sports Illustrated magazine put the late Lou Jacobs on its cover under the headline "The Godfather of Sports."

The conviction threatened the existence of the company. As a felon, it faced the possibility of losing the hundreds of contracts and licenses that formed its foundation.

So Jeremy Jacobs launched a campaign to defend his company that continues to this day. He has sought help from local politicians and a president of the U.S., while using his vast wealth – estimated at a half billion dollars – to reward allies and punish his enemies. His battlefields have included the halls of Congress. He has changed the company's name and even jettisoned a brother from the executive suits.

Richard Stephens, Delaware North's president, likens the Mafia stigma to "a ghost that won't go away." Competitors still regularly send would-be customers the old press clips about Emprise and the mob; some business opportunities "we don't hear about until after they are done," he gripes. Mr. Jacobs proclaims his company is clean and says he has spent a "horrific amount of money and years" in the struggle to prove it.

Yet some state regulators say they continue to have doubts. Though they have found no direct evidence of wrongdoing since the 1972 conviction, they still wonder: Has Mr. Jacobs engineered a cleanup or a whitewash? It is a question that seems destined to plague the company for at least another generation.

Mr. Jacobs doesn't deny that his father traveled in a rough-and-tumble world. Lou Jacobs built the company by obtaining lucrative concession contracts at sports facilities and other locations in return for providing millions of dollars in upfront payments and loans to stadium and team owners. Such were his financial contributions to major-league baseball – where Delaware North is concessionaire to a quarter of the 28 teams – that when Lou Jacobs died, the Sporting News suggested a special commemoration be set up at the Baseball Hall of Fame.

Some of those loans went to horse tracks, dog tracks and jai alai arenas. Besides concessionaire, the company also became owner and operator of a number of such facilities. Mr. Jacobs says his father's forays into the gambling world unavoidably put the company into contact with questionable characters. "It went with the territory," he says.

But some federal officials viewed the contacts as hardly innocent. In 1973, five years after Lou Jacobs's [sic] death, a report by the House Select Committee on Crime concluded that "Emprise knew, or should have known," that it was the financier or business associate for

operations with alleged mob connections stretching from New England to Nevada.

That report came on the heels of the April 1972 conviction of Emprise in Los Angeles federal court. A jury found that the company had conspired to hide its ownership interest and the interests of two reputed mob figures in the Frontier Casino in Las Vegas. According to the jury, Emprise had made hundreds of thousands of dollars in loans to front men for the alleged members at the casino. The late Lou Jacobs and his son Max, were named as unindicted co-conspirators.

By this time, Jeremy Jacobs was already firmly in charge of the company. Following the conviction, he held Emprise's first news conference to denounce "a vicious and deliberate effort to smear" his father and the company. He vowed: "We will not allow either political opportunists or business competitors to profit at the expense of my late father's good name." Emprise appealed the conviction all the way to the Supreme Court, which refused to consider the company's entreaty.

The conviction immediately gave Emprise and the Jacobs clan a certain notoriety. "I remember coming home and my mother telling me I worked for the Mafia," says Jessica Rahuha, then a fledgling company employee and now assistant to the president of Delaware North.

To protect his franchises, Mr. Jacobs went to war with his critics. One was a Congressman from Arizona, Sam Steiger, who sparked a 1973 House investigation of Emprise and traveled around the country speaking against the company. The firm sued the Republican and one of its lawyers denounced him in congressional hearings as an "evil man."

In 1976, Mr. Jacobs and Mr. Steiger met for the first and only time in Buffalo and came to an agreement. Emprise would drop its suit if Mr. Steiger wrote a letter

praising current management and supporting the company's petition for a presidential pardon.

Today, Mr. Steiger says he did so because he was about to leave office and was nearly broke from the costs of Emprise's libel suit. The pardon was eventually turned down by President Carter. But, Mr. Steiger says, "Emprise used that letter in every regulatory hearing from then on" as evidence that even its strongest critic had seen the light.

Meanwhile, Mr. Jacobs hired former top federal law-enforcement officials to check for any connections the company might have with questionable characters. As a result, the company stopped dealing with some firms. "We've made absolutely certain that everyone is cleaner than Caeser's wife," says Edward F. Foley, a Delaware North consultant and former head of a major Federal Bureau of Investigation organized-crime unit in New York.

One casualty was the grand moniker "Emprise," which means a venture involving prowess or daring. Mr. Jacobs formed a new parent company in 1980 and, for a name, looked no further than the nearby intersection of Delaware and North Streets in Buffalo.

Another casualty was brother Max, an executive vice president. State regulators expressed concern over having an unindicted co-conspirator – even one who proclaimed his innocence – tied to the firm. In 1974, Max resigned and, like his other brothers and sisters, eventually sold his share in the company to Mr. Jacobs. Removing his brother "was very tough," but necessary, Mr. Jacobs insists. Max, he says, had become "excess baggage." Max Jacobs didn't return repeated phone calls for comment.

Of course, there was one tie to the past Mr. Jacobs wasn't about to sever: himself. Mr. Jacobs had been an officer and director and far more involved in the company than Max Jacobs ever was. Yet he insists he knew nothing of mobsters or criminal acts. He also defends his father's integrity. At the same time, he and other company officials

note that, if there is blame to be allotted, it rests with the dead man: "Louis M. Jacobs alone was responsible for the transactions resulting in the conviction," says a 1984 company letter to town regulators.

In a move he admits was spurred by all the negative publicity, Mr. Jacobs became more involved in the community and quickly emerged as a major philanthropist. He and his family also methodically built political friendships, contributing to politicians ranging from former Rep. Jack Kemp, a conservative Buffalo Republican, to Bill Clinton, who since 1990 has received about $20,000 from the Jacobs clan.

Last year, critics unsuccessfully challenging a Delaware North racing license in Wisconsin saw the extent of the company's connections. While there is no evidence that any official acted inappropriately, the critics note that two top Wisconsin gaming-commission officials had been employees of a senior Delaware North executive when the three worked in state government. One of the company's local law firms had former partners in senior positions in the administration of Gov. Tommy Thompson, who appoints the gaming commission and had to approve the hearing examiner in the case. The hearing examiner was the governor's former chief of staff and a partner in a law firm that had previously done work for Delaware North.

Mr. Jacobs hasn't won every round. In 1984, for example, the Vermont Racing Commission ruled that "Jeremy Jacobs knew or should have known of Emprise's illegal activities and should have attempted to stop them." Delaware North withdrew a license application there.

In the early years of Mr. Jacob's reign there were still questions about continuing mob involvement. It took the company years, even after the conviction, to sever ties with some questionable suppliers and business associates. For example, it wasn't until 1979, after the hiring of Mr. Foley, the ex-FBI agent, that a Detroit bread supplier with

ties to a reputed mob family was dropped. A Delaware North spokesman blames such relationships on contractual commitments and the press of other business that didn't allow the company to focus on possibly questionable contacts.

Or consider the testimony of Gary Bowdach, a confessed Mafia hit man, arsonist, and federal protected witness.

In a 1980 deposition to Florida state regulators and subsequent testimony in a civil trial, Mr. Bowdach claimed that a 1974 fire at a Delaware North jai alai arena in Florida had been arranged by a mob boss in New England, supposedly in return for a cut of the insurance proceeds from Delaware North. Mr. Bowdach claimed he was offered the arson job by a mob associate but turned it down. General Electric Co. even used Mr. Bowdach as a witness to defend itself against a lawsuit in which Delaware North was claiming defective GE materials had contributed to the fire.

Delaware North denies Mr. Bowdach's allegations and says insurance payments didn't cover its losses from the blaze. The jury in the civil case absolved GE of any financial liability. According to Delaware North, the jury also found that the fire was intentionally caused but that company officials didn't know about it.

Then there is the case of Don Bolles, an investigative reporter for the Arizona Republic and a longtime critic of Emprise's operations in Arizona. In 1976, Mr. Bolles was killed by a bomb under his car in Phoenix. According to local press reports, his last words included, "They finally got me. The Mafia Emprise ..."

Two men, neither of whom had any known ties to the company, were convicted in connection with the killing. But over the years, strange bits up [sic] evidence have surfaced in court proceedings arising from the killing. These include a Phoenix policeman's claim in a deposition

that local authorities ordered the removal of information from a police file that might have linked Emprise and others to one of the killers. The company has denied any involvement and notes that official investigations have consistently cleared it of any role in the slaying.

Indeed, for well over a decade, no evidence has surfaced to suggest continuing relationships between mobsters and the company. So why are some regulators still uneasy?

In part, the concerns seem to stem from the widely held belief that once in the mob, always in the mob. At the same time, both the company and its owner are very private. That is a trait that, rightly or wrongly, may help breed distrust.

Causing raised eyebrows among some regulators, for instance, is the way Delaware North handles the tens of millions of dollars in cash generated annually from its wagering operations and food-and-drink sales. Each day, the operating units send their cash receipts to headquarters in Buffalo, which the company says is done simply to improve cash management. But it worries some officials in other states. "We need to know where the money in pari-mutuel operations goes and comes from. Here, we run into a black hole," says one state racing regulator, who adds that his agency doesn't have the authority to go through the financial records of Delaware North in New York.

Earlier this year, Mr. Jacobs faced a new potential embarrassment when Max Margulis, a veteran Delaware North official, was indicted in state court in Tampa, Fla., for his role in an alleged investment fraud in which the company isn't accused of having a role. A co-defendant was identified in the local Tampa press as the suspected head of the city's organized crime family.

Mr. Margulis has pleaded not guilty and the case recently was dismissed when prosecutors refused to comply with a court order to be more specific in their charges.

That dismissal is being appealed. Delaware North officials say they believe Mr. Margulis is innocent and have kept him on the payroll.

Yet the specter of the mob remains a seemingly eternal source of public-relations headaches. Earlier this year, Delaware North was looking to join the New York Times Co. in a bid for Madison Square Garden. Its involvement prompted a New York Post story under the headline, "Mob-case firm joins Times in Garden bid." The story described Delaware North as a "controversial" company with "a history of ties to the mob," and erroneously reported that Mr. Jacobs had been one of the unindicted co-conspirators in the 1972 criminal case. After the company threatened to sue, the Post printed a correction and wrote a letter of apology to Mr. Jacobs.

The Times ultimately decided against proceeding with a joint offer. Both sides say the bad press about Delaware North had nothing to do with that decision.

The past also intruded on what may be Mr. Jacobs's [sic] biggest triumph to date: Delaware North's selection last year as concessionaire for Yosemite. Numerous stories about the company's bid for the 15-year, $1.5 billion contract mentioned the mob – hardly the best advertisement for a firm seeking to run one of the nation's crown jewels. "Can it out-run its past?" asked the Fresno (Calif.) Bee in one article.

In this case, Mr. Jacobs's [sic] political connections helped. The company had friends in the Bush administration. Mr. Kemp, who at the time was secretary of Housing and Urban Development, wrote a letter to the Interior Department praising Mr. Jacobs. "I suggested that he should be given every consideration," Mr. Kemp recalls.

Delaware North was tentatively selected. However, losing bidders and some in Congress questioned the fairness of the selection process. So the final decision was

left to the incoming Clinton administration and Interior Secretary Bruce Babbitt.

As it happened, when Mr. Babbitt was attorney general and later governor of Arizona in the 1970s and early 1980s, he had helped work out arrangements allowing Delaware North to remain in the racetrack business there despite the 1972 conviction. Mr. Babbitt also initially headed the Bolles murder investigation that cleared Emprise. Over the years, the Jacobs family and its business arms have given thousands of dollars to Mr. Babbitt's campaigns. (Mr. Babbitt has consistently said those contributions never influenced his treatment of the company and noted that he has, at times, been a critic of the company.)

In June of last year, the Interior Department gave the green light to Delaware North's selection. Ultimately, the mob stigma "didn't make a difference," exults Mr. Jacobs. He says the firm now plans to go after other national-park contracts. Such an expansion could help offset the decline in the firm's troubled racetrack operations, which have been hurt by the spread of casino gambling.

Indeed, despite all the bad publicity, business is good. Under Mr. Jacobs's [sic] reign, Delaware North's annual revenue has risen more than 20-fold (it doesn't disclose earnings), and operations stretch from Australia to Hungary. Despite temporary banishments in the past, no state's doors are closed to Delaware North.

Though Lou Jacobs rarely allowed himself outside indulgences, his son hasn't let the family business eclipse other aspects of his life. He splits his time between a 225-acre estate in East Aurora, N.Y., and a 200-acre horse farm near Palm Beach, Florida. He has become a health enthusiast and an accomplished horseman. In 1972, when one of Jeremy Jacobs's [sic] daughters married the son of former American Express Co. Chairman James Robinson,

Mr. Jacobs and his wife, Margaret, put on what one family friend only half-jokingly calls the "wedding of the century" for more than 600 guests at the East Aurora estate.

Now he is planning for his own succession. Two of Mr. Jacobs's [sic] three sons are executives at Delaware North and are being groomed to receive the torch. Says the oldest, 32-year-old Jeremy, Jr.: "In our house, my father and grandfather are legends."

Supreme Court, U.S.
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No. 99-553

In the
SUPREME COURT OF THE UNITED STATES

THOMAS J. CORCORAN, ET AL.,

Petitioners,

v.

CROIXLAND PROPERTIES LIMITED PARTNERSHIP,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

A. Whether issuance of a writ certiorari is appropriate when the only issue for review is whether a court of appeals properly applied local law.

B. Whether the United States Court of Appeals for the District of Columbia Circuit erred in its application of District of Columbia law in holding that the Complaint in this action met the pleading requirements for the "of or concerning" element of common law defamation in three independent ways.

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STATEMENT OF THE CASE

Croixland Properties Limited Partnership ("Croixland") is a Wisconsin limited partnership and the owner of a greyhound racing facility known as St. Croix Meadows, duly licensed by the Wisconsin Gaming Commission and located in the City of Hudson, Wisconsin. This facility was constructed at a cost of approximately $40 million. *Compl.*, ¶¶ 1, 7 (App. A19-A20).

On or about September 30, 1993, plaintiff and three poor, federally-recognized Indian tribes with reservations in rural northern Wisconsin -- the Sokaogon Chippewa Community (Mole Lake Band of Lake Superior Chippewa), Lac Corte Oreilles Band of Lake Superior Chippewa Indians and the Red Cliff Band of Lake Superior Chippewa Indians -- entered into agreements providing for the sale of the plaintiff's greyhound facility property to the tribes and the joint management and control of the combined greyhound racing facility/casino by an equal partnership known as the Four Feathers Casino Joint Venture comprised of the three tribes and an affiliate of plaintiff, Galaxy Gaming and Racing Limited Partnership. The agreements were contingent upon the Secretary of the Interior approving the establishment of an off-reservation casino at the property under 25 U.S.C. § 2719(b)(1)(A) of the Indian Gaming Regulatory Act ("IGRA"), and acquiring the land in trust for the benefit of the tribes under 25 U.S.C. § 465 of the Indian Regulatory Act ("IRA"). *Compl.*, ¶ 8 (App. A20-A21).

On October 12, 1993, the three tribes submitted an application to the Minnesota Area Office of the Bureau of Indian Affairs for approval of the proposed casino at the Hudson property owned by the plaintiff. *Compl.*, ¶ 10 (App. A21). On November 24, 1994, the Minnesota Area Director recommended that the Assistant Secretary - Indian Affairs in

Washington, D.C., approve the tribes' proposed Hudson casino. *Compl.*, ¶ 11 (App. A22).

Tribes that opposed the project for competitive reasons retained the defendants and others to attempt to cause Department of Interior officials in Washington, D.C. to reject the Minnesota Area Director's proposed recommendation and deny approval of the tribes' application for approval of the proposed Hudson casino. *Compl.*, ¶ 12 (App. A22).

As of April, 1995, the defendants believed, however, that their lobbying effort was not succeeding in influencing the Department of Interior. *Compl.*, ¶ 19 (App. A24). Beginning on or about this time and at various times thereafter, defendants and other persons conspired to attempt to cause the disapproval of the proposed Hudson casino by falsely stating that the owners of the Hudson greyhound facility were connected to organized crime. This was accomplished by directly stating that the owners were connected to organized crime or by stating that a company named Delaware North owned the Hudson greyhound facility, that Delaware North was connected to organized crime and that approval of the Hudson casino would allow organized crime to be directly involved in Indian gaming. As part of this strategy, defendants and other persons known and unknown agreed to distribute copies of an article from the November 17, 1994 edition of the *Wall Street Journal*, regarding Delaware North's alleged organized crime ties, which the defendants used to support their false statements that the owner of the Hudson greyhound facility has organized crime ties. *Compl.*, ¶¶ 20, 26 (App. A24-A25, A27).

In furtherance of the conspiracy, Scott Dacey, a lobbyist for the Oneida Indians of Wisconsin, met with

Deputy Assistant Secretary of Interior, Michael Anderson, on May 23, 1995, and gave him a copy of the *Wall Street Journal* article. *Compl.*, ¶ 22 (App. A25-A26). Mr. Anderson was the deciding official at the Department of Interior, the one who less than two months later denied the application. *Compl.*, ¶ 13. (App. A22-A23).

The defendants also wanted to enlist the press in their effort to smear the owner of the Hudson greyhound facility. Thus, in a strategy memorandum dated June 5, 1995, the defendant Larry Kitto included the following item:

> Get a story in the Washington Post about Delaware North and their relationship with the tracks in Wisconsin. TOM CORCORAN, LARRY KITTO, SCOTT DACY, AND JERRY SIKORSKI WILL PURSUE THIS.

Compl., ¶ 21 (App. A25).

In addition, the defendants sought to reach out to contacts on Capitol Hill. In another strategy memorandum prepared by either Corcoran or O'Donnell, they described their plan to meet with Senator John McCain:

> We want to see him because of <u>character</u> of Delaware North--possible mafia connection--Wall St. Journal article [sic] that's relevant--

> First time of any such real evidence of connections of such an element in Indian gaming.

Compl., ¶ 23 (App. A26).

In June of 1995, defendants Corcoran and O'Donnell met with Senator McCain and told him that "the owners of the Hudson greyhound facility are connected to organized crime" and requested Senator McCain's assistance in causing the denial of the proposed Hudson casino. *Compl.*, ¶ 26 (App. A27-A28).[1] According to a May 15, 1997 article from the *Minneapolis Star Tribune*, Senator McCain told Corcoran and O'Donnell that he would ask the Justice Department to look into the casino application. *Id.*

The Complaint alleges that the defendants agreed or understood that the purpose of their meetings, discussions and agreements was to utilize the strategy described above to cause the denial of the three tribes' application for approval of the Hudson casino, understood or should have understood that their method of achieving this purpose by defaming plaintiff was tortious and unlawful and would result in injury

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[1] Petitioners have asserted that paragraph 26 of the complaint alleges that Messrs. Corcoran and O'Donnell "falsely stated to Senator McCain that **a company named Delaware North was the owner of the Hudson greyhound facility and that Delaware North was connected to organized crime.**" *Petition* at 2-3 (emphasis in original). That is not correct. In describing the meeting with Senator McCain, paragraph 26 of the Complaint alleges that "defendants Corcoran and O'Donnell met with United States Senator John McCain and told him that the owners of the Hudson greyhound facility are connected to organized crime and requested Senator McCain's assistance in causing the denial of the proposed Hudson casino." *Compl.*, ¶ 26 (App. A27-A28).

to plaintiff, and agreed and understood that each would act in concert with others to achieve this purpose by defaming the plaintiff. *Compl.*, ¶ 24 (App. A26).

On July 14, 1995, the Deputy Assistant Secretary - Indian Affairs issued a letter denying the application. *Compl.*, ¶ 13 (App. A22-A23). Six days later, on July 20, 1995, defendants Corcoran and O'Donnell wrote to Senator McCain as follows:

> Dear John:
>
> As you will recall, last month we met with you regarding the proposed conversion of a dog track in Hudson, Wisconsin, to an Indian gaming casino which would bail out the dog track owner, Delaware North of Buffalo, New York. Enclosed is the announcement by BIA about their decision to deny this application.
>
> Many, many thanks to you for your help with the Department of Justice. Without your assistance, we do not believe the BIA headquarters would have overturned its Minneapolis area office on this matter.

Comp., ¶ 26 (App. A27-A28).

The Complaint alleges that defendants Corcoran and O'Donnell intended to injure Croixland in its business reputation and to cause the Department of Interior to deny approval of the proposed Hudson casino, and that they published the defamatory statement with actual knowledge that it was false, or with reckless disregard as to its truth or

falsity. *Compl.*, ¶¶ 29-30 (App. A28). The statement that the owners of the greyhound facility -- Croixland -- are connected to organized crime published by defendants Corcoran and O'Donnell is defamatory *per se*. *Compl.*, ¶ 31 (App. A28).

Finally, the Complaint alleges that the publication of the defamatory statement was a cause of the Department of Interior's decision to deny approval of the tribes' proposed Hudson casino which further damaged plaintiff. *Compl.*, ¶ 33 (App. A28-A29).

ARGUMENT

The petition for a writ of certiorari misstates the question presented, the complaint at issue, and the decision below. The court of appeals decision deals exclusively with the "of or concerning" element of common law defamation in the District of Columbia. That unanimous decision represents a black letter application of uncontroversial and long settled common law. Petitioners' assertion that the decision below represents a "complete departure from the accepted usual course of judicial proceedings in the District of Columbia," *Petition* at *i*, is wholly unsupportable. The court of appeals application of this element of common law defamation falls far short of the threshold of importance necessary to justify this Court's attention and resources.

I. THE COURT OF APPEALS APPLICATION OF DISTRICT OF COLUMBIA COMMON LAW DOES NOT SATISFY THIS COURT'S CRITERIA FOR GRANTING THE WRIT.

Petitioners assert that in this case issuance of a writ of certiorari is appropriate pursuant to Supreme Court Rule

10(a). This rule requires petitioners to demonstrate not only that the court of appeals erred, but that it "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power." Sup. Ct. R. 10(a). Initially, it must be noted that this conflicts squarely with petitioners' representation to the court of appeals that they would seek the writ on the basis that the court of appeals decision created a rift among the federal circuits.[2]

In any case, the petitioners' request that this Court grant a writ of certiorari for the purpose of ensuring that the court of appeals properly applied an element of District of Columbia tort law ignores the well established standards for the issuance of the writ. *See Haring v. Prosise*, 462 U.S. 306, 314 n.8 (1983) ("standing alone, a challenge to state law determinations by the Court of Appeals will rarely constitute an appropriate subject of this Court's review"). Indeed, this Court has specifically noted that it "normally doe[es] not interfere" with courts of appeals decisions involving issues that "pertain solely to the local law of the District of Columbia." *United States v. Frady*, 456 U.S. 152, 159-160 (1982).

Petitioners proffer several cases they claim stand for the proposition that "[t]his Court has granted certiorari on numerous occasions where courts of appeals have issued decisions in conflict with, or refused to follow, decisions of state courts." *Petition* at 6. The foregoing incorporates two

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[2] This premise, advanced by petitioners in a brief in support of a motion to stay the court of appeals mandate, is inherently improbable. The court of appeals was applying local common law in a diversity case. The petitioners have never cited a decision from another circuit purporting to apply District of Columbia's law of defamation.

different scenarios. The first, that a court of appeals wrongly applied local law, is the one petitioners claim occurred in this case. The second, however, is the situation where a court of appeals refuses to apply local law, a scenario with absolutely no bearing on the instant case.

It is this second proposition that explains petitioners' citations. *Six Cos. v. Joint Highway Dist. No. 13*, 311 U.S. 180 (1940), *West v. AT&T*, 311 U.S. 223 (1940), and *Stoner v. New York Life Ins. Co.*, 311 U.S. 464 (1940), are all cases in which the court of appeals held that it was not bound by particular state law authority, thereby creating significant issues with regard to application of *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). In the present case, there is no suggestion whatsoever that the court of appeals deemed itself free to decide the instant case without reference to local law.[3] Petitioners' claim is merely that the court of appeals erred in its application of local law. This is a wholly different, and less momentous issue than has traditionally merited this Court's attention.

In sum, petitioners fail to address the authority establishing that this Court will not intervene to correct a court of appeals application of state common law. Moreover, the authorities proffered do not remotely touch on petitioners' grievance, that the court of appeals applied local law in a manner inconsistent with petitioners' view of the local law. Consequently, petitioners' failures highlight the fact that the criticism they level at the court of appeals decision does not

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[3] On this score, petitioners' final proffered authority is *Exxon Co., USA v. Banque de Paris et des Pays Bas*, 488 U.S. 920 (1988). Petitioners fail to note that the order found at that citation merely remands the matter for further consideration in light of an *intervening state decision*, a circumstance wholly unrelated to the one at bar.

approach the level of legal importance so as to make certiorari appropriate.

II. THE UNANIMOUS DECISION BELOW CORRECTLY APPLIED DISTRICT OF COLUMBIA COMMON LAW.

Petitioners' contention that the court of appeals made some radical break with District of Columbia common law is incorrect. The court of appeals found three independent reasons why Croxland's Complaint survives a motion to dismiss.

1. "[T]he complaint alleged that the lobbyists linked Croixland to Delaware North and Delaware North to organized crime. Even if the lobbyists misidentified the owner of the facility, it did not remove the taint to the true owner." (App. A7).

2. "[T]he complaint alleged that Croixland was defamed because statements were made about 'the owner of the track' having connections to organized crime." (App. A7).

3. The complaint pled an alternative theory under Federal Rule of Civil Procedure 8(e), "namely that defamatory statements were made directly about Croixland without reference to Delaware North." (App. A8).

Consequently, in contrast to the petitioners' attack on what they construe as a single ground for the court of appeals reversal of the trial court, petitioners must demonstrate that *each* of the *three* grounds is a "complete departure from the accepted and usual course of judicial proceedings in the District of Columbia." *Petition* at *i*. Failing to acknowledge the three independent bases of the court of appeals decision, petitioners misharacterize this decision as "holding that a defamation claim exists even if a listener only understands the status of the allegedly defamed party (such as 'the owner') without there being any allegation that sufficient information was brought to the listeners attention so that he could reasonably identify the aggrieved party by name. *Petition* at 4.

Petitioners rely mainly on *Harmon v. Liss*, 116 A.2d 693 (D.C. 1955). This reliance is misplaced. First, *Harmon* was an appeal of a judgment notwithstanding the verdict and therefore cannot be understood to create a pleading standard as petitioners suggest. Second, nowhere does *Harmon* state that defamation is actionable only if the victim is identified "by name." Rather, *Harmon* stands for the well established proposition that "the person slandered need not be specifically named in the defamatory language as the surrounding circumstances may be such as to leave no doubt in the mind of the hearer as to his identity." *Id.* at 695.

The proposition that a plaintiff must allege that a listener derived the plaintiff's *name* from the circumstances of the defamation in order to meet *Harmon's* identification requirements is wholly unsupported. According to the petitioners' argument, a defamation claim cannot survive a motion to dismiss if on the face of the complaint it does not appear that the listener could name the victim -- no matter

how definitively the victim is otherwise identified, *e.g.*, by address, job title, photograph, or, as in the present case, by the victim's status as the owner of a precisely identified property. The rule that petitioners advocate is plainly contrary to the general rule. "It is not necessary that the plaintiff be designated by name; it is enough that there is such a description of or reference to him that those who hear or read reasonably understand the plaintiff to be the person intended." *Restatement (Second) Torts* § 564, *comment b* (1977). Thus, the issue is whether a party can be identified with sufficient certainty, not whether it can be determined by name.

The general rule, moreover, has previously been applied in the District of Columbia. For example, *Caudle v. Thomason*, 942 F. Supp. 635 (D.D.C. 1996), involved a defamation claim based on allegedly defamatory statements about a business brought by the individual CEO and president of the business. Turning back a motion to dismiss aimed at defamation's "of or concerning" element, the court reasoned that "[e]ven though the statements do not explicitly refer to Caudle, Caudle may prevail if a listener would reasonably believe that the statements referred to him." *Id.* at 638. Because Caudle was "closely associated" with the company, the court held that the complaint met the "of or concerning" element. *Id.* Similarly, because the plaintiff in the present case is the owner -- the only owner -- of the Hudson, Wisconsin greyhound facility, the alleged defamatory statement that the owner of that facility is connected to organized crime is plainly "of and concerning" the plaintiff.

It is thus not true, as petitioners state, that the court of appeals holding is a "complete departure from the accepted usual course of judicial proceedings in the District of Columbia." *Petition* at *i*.

Petitioners also assert that the court of appeals decision in this case is "contrary to the decisions of other circuits interpreting similar defamation laws." *Petition* at 6 n.2. Yet, not a single cited case supports the proposition that a victim must plead that he was identifiable by name in order to state a claim for defamation. For example, *Ruzicka v. The Conde Nast Pubs., Inc.*, 999 F.2d 1319 (8th Cir. 1993), is *not* a defamation or tort case at all. Rather, it is a contract case focusing on promissory estoppel in the context of a contract by which a magazine agreed not to identify an individual. Indeed, in contrasting the issues in that case with defamation "identity" issues, the court noted that whether a defamatory statement is of or concerning a plaintiff "is a question for the jury to be determined from the story as a whole." *Id.* at 1322. Insofar as *Ruzicka* is instructive on a matter of defamation law, it explicitly provides support for denying petitioners' motion to dismiss the complaint before the development of any evidence.

Similarly, petitioners' citation of *Taj Mahal Travel, Inc. v. Delta Airlines, Inc.*, 164 F.3d 186 (3d Cir. 1998), does nothing but undermine the petitioners' own notion of the law. That case involved a letter Delta Airlines published to holders of stolen airline tickets. While the letter did not refer to specific travel agents, the court of appeals reversed a judgment on the pleadings because the ticket holders' knowledge of the agency at which they purchased the tickets could meet the "of or concerning" element. *Id.* at 190. Likewise, petitioners' reference to the owner of the Hudson greyhound racing facility, and the listeners' knowledge of the subject of the meeting, more than meets the element.

Petitioners also cite *Fetler v. Houghton Mifflin Co.*, 364 F.2d 650 (2d Cir. 1966). This case is part of the discrete

area of defamation law involving defamation by fiction, an issue not present in the instant case. This unremarkable opinion reverses summary judgment for the defendant on the ground that the similarity between a book's character and the plaintiff could permit a jury to find the requisite identification. *Id.* at 651.

Finally, *Golden North Airways v. Tanana Pub. Co.*, 218 F.2d 612 (9th Cir. 1955), also undermines petitioners' position. That case dealt with a newspaper editorial's alleged defamation of a particular class of air carriers. First, *Golden North* was a post-jury verdict case and not a sufficiency of the complaint case. Second, that opinion specifically addresses when an individual member of a group may sue personally over a defamatory statement about the group. The court specifically recognized that an *unnamed* individual member of a small group may sue when the group is defamed because the size of the group could lead a listener to attribute the statements to the individuals within the group. *Id.* at 318-19. This is not at issue in the instant case because the Hudson greyhound racing facility has only one owner: Croixland.

In sum, the petitioners -- after motion practice in the trial court, a full appeal, a motion for reconsideration with a suggestion for hearing en banc, a motion to stay the mandate in the court of appeals and, now, a petition for a writ of certiorari -- cannot proffer a single authority, within or without the District of Columbia, that supports the proposition that a defamation plaintiff must plead that the defamation made him identifiable "by name." Moreover, petitioners fail to recognize that the court of appeals found three independent reasons the allegations of Croixland's complaint met the "of or concerning" element, including that the Complaint alleges "that defamatory statements were made directly about

Croixland." (App. A8). Having declined to address these three independent grounds, petitioners have failed to create an issue for this Court's consideration.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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